No. 11,695

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CAL-BAY CORPORATION, MARIA FARIA, JOSEPH FARIA, JR., EDWARD FARIA, and MAE E. ROCHE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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FOREWORD.

With the exception of the final subdivision herein which combines several subdivisions of the opening brief, the appellants adhere to the subdivision headings of that brief in replying to the arguments of the appellee.

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1. THE COMPENSATION AWARDS ARE INADEQUATE AS A MATTER OF LAW AND ARE NOT JUST COMPENSATION.

In answer to this subdivision the appellee invokes the conflict of evidence rule (Bf. Appellee, p. 10), and argues: (A) That "appellants were not entitled to recover their investment in the well" (Bf. Appellee, p.

10); (B) that "the court did not commit error in relation to testimony of value based on speculation" (Bf. Appellee, p. 14); (C) that "under the evidence the jury was not bound to find severance damages" (Bf. Appellee, p. 16); (D) that "appellants were not denied compensation for their reversionary interests" (Bf. Appellee, p. 17); (E) that "the court did not exaggerate appellants' claim for compensation" (Bf. Appellee, p. 18); and (F) that "under the evidence the jury was not bound to find that appellants' properties contained gas in commercial quantities" (Bf. Appellee, p. 20).

Appellants are not combating the conflict of evidence rule. Nor are they seeking anything more than the just compensation to which the law entitles them. Separate replies will be made to the above arguments of the appellee.

A. As pointed out in the opening brief at page 6, the well drilled by appellant Cal-Bay Corporation on leased property, reflected an investment by the public of over $250,000. Only a small part of this investment was recouped by the removal of personal property from the well. It is true that when the appellee took this property it left untaken other property held under lease in the same general district. But to hold those leases, as pointed out at pages 3, 4, and 24 of the opening brief, another well had to be drilled and another investment made of $250,000 or whatever the cost might be. This factor alone makes it evident that the taking of the well by appellee was a distinct loss by appellants of the cost or value of the well. And the

general rule has said that "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken". (*United States v. Causby,* 328 U. S. 256, 261, 66 S.Ct. 1062, 1064-1065.) "The owner," said the Supreme Court in *United States v. Miller,* 317 U.S. 369, 373, 63 S.Ct. 276, 279-280, "is to be put in as good condition pecuniarily as he would have occupied if his property had not been taken".

The factor mentioned was considered by appellants' witness Wents in his valuation testimony. (R. 832.) He placed the cost or value of the well at $234,000. (R. 799, 828.) Bradford, the other valuation witness for appellants, placed the value or cost at $150,000. (R. 861.) Armstrong and Paine, the valuation witnesses for appellee, said that the well had no value because it was in bad mechanical condition (R. 1088, 1133), but their valuation testimony failed to consider the factor mentioned.

Appellee has therefore missed the mark in arguing that "appellants were not entitled to recover their investment in the well".

B. Appellee is correct in saying that "appellants do not contend that any evidence offered by them was rejected on the ground that it was speculative". (Bf. Appellee, p. 15.) Their arguments under the letter "B" (Bf. Appellee, pp. 15-16) have reference to the acts and conduct of the trial judge rather than to the sufficiency of the evidence, and reply thereto will be made in a later part of this brief.

C. At page 17 of its brief the appellee directs the attention of the court to the testimony of Armstrong

and Paine that no severance damage was suffered (R. 1089-1091, 1132-1133), and argues that such testimony warranted a jury finding that no severance damage was suffered. Each said witness gave as the reason for his opinion the fact that remaining areas were of sufficient size to warrant developing. (R. 1089, 1133.) No case supporting the sufficiency of that reason is cited by appellee.

The general rule respecting severance damages is stated in *United States v. Miller,* 317 U.S. 369, 376, 63 S.Ct. 276, 281, 87 L.Ed. 336, as follows:

> "Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings. One of these is that a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of a part or all of it. This has begotten subsidiary rules. If only a portion of a single tract is taken the owner's compensation for that taken includes any element of value arising out of the relation of the part taken to the entire tract."

Upon an application of this general rule to the present case, the appellants were clearly entitled to severance damages. All properties and property interests taken by the appellee were part of an entity which had been integrated into a general district for oil and gas development. The well on part inured to the benefit of all. It is enough to again point out that the taking of well destroyed the entity and that the drilling of another well was necessary to restore the integration.

D. Here the argument of appellee is that the jury awards were not inadequate so far as compensation for reversionary interests was concerned. (Bf. Appellee, pp. 17-18.) But the record definitely shows the contrary. The awards made were based on the testimony of appellee's valuation experts. Their testimony did not consider the entity factor above discussed. Nor did their testimony consider the factor that the taking of the well might result in the abandonment of the leases and reversion to the lessors of the entire mineral rights. In a later part of this brief reply will be made to appellee's arguments respecting the state of the instructions on the subject. (Bf. Appellee, pp. 17-18.)

E. What appellee says as to exaggeration by the court of appellants' claim for compensation (Bf. Appellee, pp. 18-19) is not pertinent to the question of sufficiency of evidence. It is pertinent only to the question of fair trial. Reply thereto will be made herein when this latter question is under discussion.

F. It appears in the record without conflict that gas in commercial *quality* was encountered during the drilling of the well. Appellee is quite correct, however, that the evidence was in conflict as to whether the "blow-out" in the well at a depth of 4975 feet on November 28, 1944, demonstrated a discovery of gas in commercial *quantity*. (Bf. Appellee, pp. 19-20.) The appellee was responsible for the situation that appellants' testimony on the subject was wholly opinion in character and it may not legitimately complain thereof, for shortly after the well became temporarily

disabled by the "blow-out" the appellee terminated the right of appellant Cal-Bay Corporation to possession of the well. It is obvious, of course, that the state of the evidence on this phase of the case is not at all determinative of appellants' point that the damage awards are inadequate.

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2. APPELLANTS WERE DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE ACTS AND CONDUCT OF THE TRIAL JUDGE.

The appellee does not deny the truth of appellants' statement that "the trial judge was an avowed partisan at the trial". (Ap. Op. Bf. p. 28.) The record, of course, permits no other conclusion. (Ap. Op. Bf. p. 28; R. 1140.) And the appellee does not deny the truth of appellants' statement that "the trial judge became an avowed partisan against the appellants because of some personal and uncommunicated knowledge or belief or experience of his own touching oil and gas matters". (Ap. Op. Bf. p. 39.) Again the record permits no other conclusion. (Ap. Op. Bf. pp. 29-39; R. 850-857, 903-908,926-927.) Nor does the appellee deny the truth of appellants' statement that the trial judge "openly branded appellants' expert witness Bradford a prevaricator and discredited him before the jury". (Ap. Op. Bf. p. 39.) Once more the record permits no other conclusion. (R. 905-908.)

Appellee does deny, however, the truth of appellants' statement that the trial judge "branded appellants' witness Wents a prevaricator and discredited

him before the jury". (Bf. Appellee, p. 22.) Unless a practical and realistic viewpoint is to be discarded, the record is just as plain in its conclusion that witness Wents was impliedly branded as it is that witness Bradford was expressly branded. The express brand was applied to witness Bradford because he said that a purchaser had paid $3500 a per cent for a lessor's royalty in an unproved piece of land. (Ap. Op. Bf. p. 36.) Under interrogation by the court, witness Wents later said that the value of the lessor's royalty interest of appellant Maria Faria was approximately $5000 a per cent, and that the witness knew of an instance where as high as $140,000 a per cent had been paid. (Ap. Op. Bf. p. 38.) Could any juror possibly doubt that if the court put the express brand on witness Bradford because he said $3500, the same brand was put by implication on witness Wents because he said $5000 and $140,000? All this, it is to be remembered, occurred before the court had heard the testimony of appellee's valuation experts Armstrong (R. 1064) and Paine (R. 1127), and at a time when the court was obviously drawing upon some personal and uncommunicated knowledge or belief or experience of his own touching matters properly the subject of expert testimony.

There is an intimation at page 22 of appellee's brief that the court instructed the jury to disregard its comments on witness Bradford. The record shows the contrary. The admonition to the jury was confined to the court's statement, "Well, I do not know what has hap-

pened to our Corporation Department in the State of California. This is all I can say." (R. 907-908.)

The language of the recent California case of *Etzel v. Rosenbloom,* 83 A.C.A. 954, is so pertinent to the situation here presented, that appellants quote therefrom, commencing at page 957:

> "The following rules are applicable to the present situation: (1) Any misconduct on the part of the trial judge from which it may be rightfully deduced that the jury was influenced in rendering its verdict constitutes prejudicial error. (Cases cited.) (2) General Rule: Unless the harmful result of the misconduct of the trial judge cannot be obviated by an appropriate instruction, error cannot be predicated thereon in the absence of (a) an assignment of such misconduct as error and (b) a request to the trial court to instruct the jury to disregard it. (Cases cited.) Exception: In cases where an admonition of the judge to the jury to disregard his misconduct would not remove the prejudicial effect of such misconduct, it is not a prerequisite to urging such error on appeal for the appellant to have objected thereto and made a request that the jury be instructed to disregard it. (Cases cited.) There is *never* an instance which justifies a trial judge or counsel in being discourteous one to the other, to witnesses, parties litigant or jurors. A judge presiding at a trial should conduct it in a fair and impartial manner, and refrain from making unnecessary comments during the course of the trial which may tend toward a prejudicial result to a litigant. (Cases cited.) Applying the foregoing rules to the facts of the instant case it is evident that the trial

judge's remarks were of such a character as to indicate to the jury, first, that defendant Abe Rosenbloom was not telling the truth; second, that defendants' car had struck the plaintiff; and third, that defendants' counsel was trying to keep the facts from being presented to the jury. Therefore, under rule 1, supra, such conduct constituted prejudicial error. It is likewise evident that an objection to such misconduct and an admonition by the court to the jury to disregard it would have been ineffectual and would have accentuated the error rather than have removed it. Therefore this case falls under the exception rather than under the general rule set forth above (number 2), and hence it was unnecessary for defendants to have objected to the misconduct of the trial judge and to have requested him to admonish the jury to disregard it."

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3. **THE TRIAL JUDGE BECAME A PARTISAN AND EXCEEDED THE BOUNDS OF PROPER COMMENT IN THE JURY INSTRUCTIONS.**

In the opinion of appellants' witness Byron Norris, a consulting engineer and geologist (R. 621), a commercial discovery of natural gas had been made at the well in Martinez sands or formation on November 28, 1944 (Ap. Op. Br. p. 8; R. 682-683). Comments of the court were not directed at his testimony.

This factor of commercial discovery formed a basis for the opinions on value expressed by appellants' witnesses Wents (R. 810-811) and Bradford (R. 869). In the opinions of appellee's witnesses Armstrong (R.

1097) and Paine (R. 1144) discovery had not been made. According to witness Paine his values would have been higher if discovery had been established as a factor. (R. 1144.) According to witness Armstrong his values would have been higher if penetration of the Martinez sands or formation had been established as a factor. (R. 1113.) Other factors forming a basis for the opinions on value expressed by appellants' witnesses and not considered in the opinions on value expressed by appellee's witnesses have been mentioned in earlier parts of this brief.

With one exception, the values given by witness Paine were greater than those given by witness Armstrong, and in one instance six times greater. In the exception mentioned, the values given by witness Armstrong was about twice that of witness Paine. Some of the values given by witness Wents were five or six times greater than those given by witness Paine; others were very much higher.

In the jury instructions, the trial judge expressed the opinion that the testimony of appellants' witnesses on value, that is, Wents and Bradford, was "extravagant" and "incredible". (Ap. Op. Bf. p. 41.) That, obviously, was but another way of saying that they were prevaricators. This opinion of the trial judge, as already demonstrated, was formed before testimony on value was adduced by the appellee, and was undoubtedly based on matters outside the record or a misconception of law. (Ap. Op. Bf. pp. 39-40.) And this opinion was followed by figures formulated

by the trial judge and submitted for jury consideration whereby the *claims* allegedly made by appellants and totalling $786,225, were contrasted with the highest values given by appellee's valuation experts in their *testimony* and totalling $3865. (Ap. Op. Bf. p. 41; R. 1192-1193.) The court also added: "I call your attention to the fact that there is a staggering divergence of opinion between the values testified to by those who have testified on behalf of the defendants and those who have testified on behalf of the Government. The total figures of the defendants' claim is $786,000. The total figures of values asserted by the Government is $3,865". (R. 1196.)

The figure $786,225, stated by the court, reflected the total of the *claims* as they appeared in the pleadings of the defendants. This is conceded by the appellee. (Bf. Appellee, p. 19.) The appellee also concedes that the total of the values testified to by appellants' valuation experts was less than the figure $786,225. (Bf. Appellee, p. 19.) This court, therefore, cannot be aided by a debate as to whether appellants' tabulation (Ap. Op. Bf. p. 9) or appellee's tabulation (Bf. Resp. App.) is the correct one. What is here apparent, then, is that a misleading figure prejudicial to appellants was submitted to the jury by the trial court.

It is said by the appellee, however, that the total of the *highest values* testified to by appellants' witnesses fairly approximates the figure $786,225. (Bf. Appellee, p. 19.) But the rudiments of fair play would at least exact the minimal requirement that a court

which tells a jury that values are "extravagant" or "incredible" or "staggering" should not overstate those values or state the highest values when *lower values* have been given. And even if appellee's tabulation be accepted as correct, it clearly appears therefrom that the total of the *lowest values* set forth does not fairly approximate the figure $786,225. It is perhaps unnecessary to say that the rudiments of fair play are not to be relaxed simply because the United States was the plaintiff in the action. (*E. C. Shevlin Co. v. United States,* 9 Cir. 1944, 146 F2d 613, 615.)

The case of *Quercia v. United States,* 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321, cited and quoted at pages 42 to 44 of the opening brief, is decisively to the effect that the trial judge exceeded the bounds of proper comment in the jury instructions. Other cases may be added.

In *United States v. Murdock,* 290 U.S. 389, 394, 54 S.Ct. 223, 225, it was said that "a federal judge may *analyze the evidence,* comment upon it, and express his views with regard to the testimony of witnesses, *but the decision* of issues of the facts must be *fairly* left to the jury". (Emphasis added.)

In *Starr v. United States,* 153 U.S. 614, 14 S.Ct. 919, 923-924, it was said:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling. Hicks v. United States, 150 U.S. 442, 452, 14 S.Ct. 144.

The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree; and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterance. * * * Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which, and the manner in which, the administration of justice should be conducted, are the same everywhere; and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them."

In *Hunter v. United States,* 5 Cir. 1932, 62 F2d 217, it was said, at page 220:

"The assignments of error based on the district judge's cross-examination of appellant are in our opinion well taken. While that method of cross-examination, if it had been conducted by the district attorney, might have been proper, a district judge ought never to assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the government. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any question he asks go beyond the point of seeing to it, in the interests of justice, that the case is fairly tried. We refer with entire approval to what Judge Shelby, speaking for this court long ago, said on this subject in *Adler v. United States,* 182 F.464. The only conclusion that could reasonably be

drawn from the questions objected to was that the judge did not believe appellant was telling the truth about the amount or source of his income, but was thoroughly convinced and was attempting to demonstrate that appellant was deriving a large income from the illegal transportation and sale of liquor. The judge's charge was not as objectionable as was his cross-examination of appellant, but it was erroneous in that it was one sided, and placed undue emphasis on the testimony of appellant which the judge himself had brought out by his questions. If the trial judge comments on the evidence, as he has a right to do, he should call attention to the evidence in favor of as well as that against the accused. * * * That the district judge did not intend to be unfair is beside the question. The case was tried in such a way that the jury, in considering as a whole the judge's questions and charge, might well have reached the conclusion that he was not impartial, but was insisting upon a conviction. It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial."

In *Musick v. United States,* 6 Cir. 1924, 2 F2d 710, it was said, at page 711:

"Under all the recited circumstances, we are compelled to think this portion of the charge to have the aspect of argument and advocacy beyond the permissible limit. Wallace v. United States, 281 F. 972, and cases cited. * * * An objection in

this respect is not necessarily removed by the formal statement that the jury was under no obligation to adopt the judge's opinion; *indeed, that statement may well be put in such a form as to imply disparagement of the jury's intelligence if it does not agree with the judge; the present charge does not lack that atmosphere.*" (Emphasis added.)

And in *Hobart v. United States,* 6 Cir. 1924, 299 F. 784, it was said, at page 785:

"We do not disparage the power—and sometimes the duty—of the federal judge to assist the jury in reaching the right conclusion on the facts. This right, and its properly restrained exercise, strongly tend to make the federal trial court efficient and dependable judicial machines; *but the due restraint of its exercise is as important as the existence of the power.*"

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4. THE JURY WAS MISDIRECTED TO THE PREJUDICE OF APPELLANTS.

The specifications of error based on the giving and refusing of instruction and discussed at pages 44 to 48 of the opening brief, are grouped under the above heading in this reply brief. The reply will be short.

It is true that throughout the trial the interests of appellants Maria Faria, Edward Faria, and Mae E. Roche were usually referred to as royalty interests. As a matter of fact, however, the interest of each said appellant was broader than a mere royalty interest, and the use of loose terms during the trial made

it necessary for clarification in the jury instructions. Particularly so, because appellants' witnesses valued these interests on factors not covered by appellee's witnesses in arriving at their values. Appellee's point that the court should have clarified the forms of verdict in this respect, is obviously well taken. (Ap. Op. Bf. p. 44.)

The jury was expressly told that it was "not to consider what the property or interest taken was worth to the defendants or any of them or to the owners of the leasehold or to the owners of the royalty interest for speculation". (R. 1183.) This was contrary to the law. (*Montana Ry. Co. v. United States,* 137 U.S. 330, 11 S.Ct. 96, 34 L.Ed. 681; *Eagle Lake Improvement Co. v. United States,* 5 Cir., 141 F2d 562, 564.) Manifestly, the refusal of appellants' instruction based on said cases was prejudicial error. (Ap. Op. Bf. p. 45.)

Appellants' requested instruction No. 44 was patterned on a similar instruction given in *United States v. Block,* 9 Cir. 1947, 160 F2d 604, and appearing at pages 481 and 482 of the record in that case (No. 11282). That the circumstances of this case demanded the giving of the requested instruction, is not susceptible to doubt. (Ap. Op. Bf. pp. 45-47.) For a similar reason, the same must be said of the refusal to give the instruction discussed at pages 47 and 48 of the opening brief.

CONCLUSION.

Appellants again respectfully submit that a miscarriage of justice occurred in the trial court, that the trial court abused its discretion in denying a new trial, and that the judgment appealed from should be reversed as to each appellant.

Dated, San Francisco,
April 5, 1948.

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